United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. **74-1029**

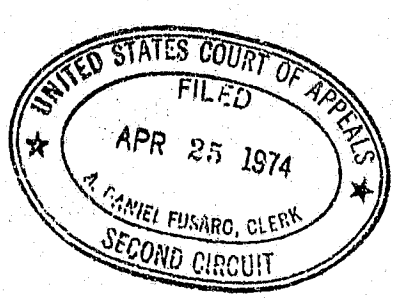
UNITED STATES OF AMERICA, Plaintiff- Appellee

v.

JOHN P. CLEARY, Defendant- Appellant

Appeal from the United States District Court for the District of Vermont

BRIEF FOR THE UNITED STATES



GEORGE W. F. COOK
United States Attorney
District of Vermont

PETER M. CLEVELAND
Attorney for Defendant-Appellant
Box 123
Essex Junction, Vermont 05452

TABLE OF CONTENTS

TABLE OF CASES

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

JOHN P. CLEARY,
Defendant-Appellant

BRIEF FOR THE PLAINTIFF-APPELLEE

ACTION BELOW

Defendant John P. Cleary was found guilty by a jury under Counts I and II of an Indictment at a trial held at the United States Court House in Brattleboro, Vermont, from July 24 through July 28,

1973, before the Honorable James S. Holden, Chief Judge of the United States District Court for the District of Vermont.

Indictment No. 73-37, filed May 17, 1973, charged defendant John P. Cleary with two violations of the State Firearms Control Assistance Law. Count I charged that on or about May 3, 1973, John P. Cleary, a licensed firearms dealer, unlawfully, willfully and knowingly did sell and deliver a 9 mm. semi-automatic pistol handgun to Richard C. Dotchin, a person whom defendant Cleary knew or had reasonable cause to believe did not reside in the State of Vermont, in violation of 18 U.S.C. § 922(b)(3). Count II similarly charged that on or about May 3, 1973, Cleary, a licensed firearms dealer, unlawfully, willfully and knowingly did sell and deliver a .38 caliber revolver handgun to Paul B. Flynn, a person whom defendant Cleary knew or had reasonable cause to believe did not reside in the State of Vermont, in violation of 18 U.S.C. § 922(b)(3).

On November 26, 1973, defendant Cleary was sentenced to pay a fine of $1,000.00 on Count I and was given a one year suspended sentence of imprisonment on Counts I and II, the same to run concurrently.

Thereafter, on November 26, 1973, defendant Cleary filed his notice of appeal.

STATEMENT OF FACTS

At all times material herein, the defendant John P. Cleary was a federally licensed firearms dealer and the operator of the Powder Horn Gun Shop in Williston, Vermont (Tr. 101, 102, 103). On March 23, 1973, Special Agent Christopher Cuyler of the Alcohol, Tobacco and Firearms Division (ATF) of the United States Treasury Department visited the Powder Horn Gun Shop (Tr. 105). Cuyler's duties with ATF involved the enforcement of the Gun Control Act of 1968 (Tr. 100). Cuyler had known Cleary for some time and had visited the Powder Horn Gun Shop previously in connection with his official duties (Tr. 105).

Upon entering the Powder Horn Gun Shop on March 23, 1973, Cuyler saw defendant Cleary. In testifying at the trial, Cuyler clearly identified defendant Cleary as being in the gun shop on March 23, 1973 and testified that he had conversations with defendant Cleary on that occasion (Tr. 101, 112). Cuyler further identified a copy of the federal firearms license held by Cleary (Govt. Ex. 3) (App'x. p.7),

which indicates that the federal license ran to John P. and Arlene S. Cleary doing business as the Powder Horn Gun Shop, Williston, Vermont, and was in effect at all times material herein (Govt. Ex.3; Tr. 103, 104).

Cuyler further testified that on March 23, 1973, the following occurred: that at about 4:00 P.M. on March 23, 1973, Cuyler arrived at Cleary's shop (Tr. 106); that prior to going into the gun shop, Cuyler observed three men get out of a 1971 Toyota truck, bearing a New York State registration plate, and enter the gun shop ahead of him (Tr. 106); that Cuyler later learned that the men were Stephen Titcum of Perkinsville, Vermont (Tr. 107), Henry Duvernoy and Fred Hall (Tr. 106); that upon entering the gun shop, Hall looked over several shotguns for a period of time, with Titcum and Duvernoy looking on (Tr. 107); that after a while, Fred Hall told defendant Cleary that he wanted to purchase a certain shotgun which Hall then held in his hands (Tr. 107); that thereupon, Titcum stepped up to Cleary and handed Cleary his Vermont driver's license (Tr. 107); that thereafter, defendant Cleary filled out a Firearms Transaction Record Form #4473 of a type similar to

Government's Exhibit 4, using information given to Cleary by Titcum (Tr. 108); that after completing this form #4473, as required by Treasury regulations, Cleary handed the form over to Titcum, telling Titcum to answer the applicable questions and sign the same, which Titcum did (Tr. 110); that thereafter, defendant Cleary asked Hall what serial number he wanted stamped on the shotgun and Hall indicated a number to Cleary and Cleary stamped the number on the shotgun (Tr. 110-111); thereafter, Titcum turned to Hall, who gave Titcum money from his (Hall's) wallet and then Titcum paid Cleary for the shotgun (Tr. 111); after the purchase was complete, the three left the shop, with Hall carrying the shotgun (Tr. 112).

Cuyler further testitied that after Hall, Titcum and Duvernoy had left the shop, Cuyler approached Cleary and asked him if the reason why Cleary had not sold the shotgun directly to Hall was because Hall was from New York State and Cleary replied "Maybe." (Tr. 112); Cuyler then told Cleary

that it was wrong for Cleary to sell the shotgun to Titcum, knowing it was for Hall (Tr. 112). After some discussion, Cleary became upset and Cuyler left (Tr. 113).

Cuyler further testified that after leaving the Powder Horn Gun Shop on March 23, 1973, he reported the "violation" to his supervisor in Worcester, Massachusetts and to the U.S. Attorney's Office in Rutland, Vermont, where it was decided that Cuyler would continue his investigation and where it was further decided that ATF would send some undercover agents to Cleary's shop to determine if Cleary was selling to non-residents (Tr. 647, 648).

On April 23, 1973, Special Agents Richard C. Dotchin and Paul B. Flynn of the ATF Division of the U.S. Treasury Department made a visit at the Powder Horn Gun Shop in an undercover capacity (Tr. 149). This undercover assignment had resulted from Cuyler's report to his superiors on March 23, 1973 of the apparent firearm law violation involving Cleary as the result of the Titcum-Hall transaction on March 23, 1973. Both Dotchin and Flynn used their correct names and residences (Dotchin from Connecticut and Flynn from

Massachusetts) at all times during their visit at the gun shop (Tr. 150). After entering the gun shop, Dotchin looked at a number of guns and then selected a pistol which he informed Cleary he would like to purchase (Tr. 154); Cleary then said it was against federal law to sell the pistol to Dotchin and that Dotchin would have to get a Vermont resident to buy the firearm for him (Tr. 155); Cleary also asked Dotchin where he was from and Dotchin said "Connecticut" (Tr. 155); Agent Flynn then spoke up and said that "Harry" could probably purchase the pistol for Dotchin, and Cleary then said "Is Harry over 21?" and Cleary was informed that he was; that Dotchin and Flynn then left Cleary with the understanding that they would probably be back "next week" with "Harry" to purchase the firearm (Tr. 155).

On May 3rd, 1973, at about 1:45 P.M., Agents Dotchin and Flynn again visited the Powder Horn Gun Shop in an undercover capacity, along with Detective Trooper Harold Anderson of the Vermont State Police, who was also operating in an undercover capacity (Tr. 156). Both Agents Dotchin and Flynn intended to

attempt to purchase handguns from Cleary (Tr. 157, 158). After some conversation between Dotchin and Cleary, Cleary made reference to Trooper Anderson, asking Dotchin if Anderson was his "Vermont victim," to which Dotchin replied "yes" (Tr. 162). Cleary then showed Dotchin several handguns suitable "for personal protection" and Dotchin finally selected for purchase a Mauser 9 mm. semi-automatic pistol (Govt. Ex. 5; Tr. 164). After Dotchin indicated he would purchase the Mauser for $118.50, Cleary then asked Trooper Anderson for his Vermont driver's license, which Anderson handed to Cleary (Tr. 166). Cleary then completed a Treasury Form #4473 (Govt. Ex. 1) (Firearms Transaction Record), which included the recording of Anderson's name, height, weight, race, address, date of birth and place of birth, as well as the identification used and the type of gun, and Cleary's signature as owner of the Powder Horn Gun Shop (Govt. Ex.1). Cleary then gave the form to Anderson who answered the questions thereon and signed his name (Tr. 166). Dotchin then took possession of

the handgun and eventually left the shop with it in his possession (Tr. 169). Agent Flynn had a similar transaction with Cleary following the Dotchin transaction. Flynn indicated that he would purchase a .38 caliber Smith & Wesson revolver. Cleary then asked Anderson if he would mind signing another Firearms Transaction Form and Anderson indicated he would accommodate. Cleary then filled out a Form 4473 covering the Flynn transaction, again using Anderson as a purchaser and Anderson's Vermont driver's license as a means of identification (Govt. Ex.2). Agent Flynn then handed Cleary five $20 bills for the purchase of the revolver. Thereafter, all three undercover agents left the shop, Dotchin carrying the Mauser and Flynn the Smith & Wesson. At no time did Trooper Anderson have either firearm in his hands or possession (Tr. 172).

After leaving the gun shop, Agents Dotchin and Flynn reported these happenings to their superiors, which resulted in the two-count indictment against defendant Cleary.

As stated above, defendant Cleary was definitely identified at the trial by Agent Cuyler as the person who handled the Titcum transaction on March 23, 1973, including the execution of a Form 4473 similar to Government's Exhibit 4. Cleary was also identified as the owner and operator of the Powder Horn Gun Shop in Williston, Vermont, by introduction of his Federal Firearms License (Govt. Ex.3). Regarding the May 3rd, 1973 transactions, circumstantial evidence was introduced in the form of two Form 4473 records from which the jury could have found that defendant Cleary was the person who handled the sales to Agents Dotchin and Flynn on May 3rd, 1973, which sales were the basis for Counts I and II. Thus, the jury had before it enough evidence to decide the issue of identification, even before the Government had finished its case. Any doubt regarding identification was put to rest when the defendant took the stand in his own defense.

ARGUMENT

I. THE TRIAL COURT'S INSTRUCTIONS RELATING TO THE SALE AND DELIVERY OF FIREARMS TO A NON-RESIDENT WERE PROPER WHEN VIEWED IN LIGHT OF THE ENTIRE CHARGE. FURTHER, THERE WAS NO MEANINGFUL OBJECTION TO THE CHALLENGED INSTRUCTION AND HENCE THE ISSUE HAS BEEN WAIVED.

In point I of his brief, defendant Cleary contends that the trial court committed reversible error by instructing the jury as follows:

> "As to...The second element which is in dispute, I instruct you that you must find, beyond a reasonable doubt, that the defendant sold the firearms in question to the named persons and that he delivered the firearms to the persons so named." (Tr. 803)

In essesnce, the defendant contends that the foregoing part of the charge directed the jury to find that the defendant sold and delivered the firearms to Agents Dotchin and Flynn, and that this "direction" from the Court removed from the jury's consideration one necessary element of the crime, to wit, the sale and delivery provisions of 18 U.S.C. 922(b).

There is no merit to defendant's contention when the portion of the charge objected to is

viewed against the entire charge, as is required. U.S. v. Hernandez, 361 F.2d 446 (2d Cir. 1966).

In viewing the charge as a whole, the following is material:

1. The Court commenced its charge by restating each of the two counts in the indictment, which indictment charged the defendant Cleary with the sale and delivery of handguns to Dotchin and Flynn (Tr. 791).

2. The Court cautioned the jury in its charge "You are not to single out one instruction alone ... but you must consider the instructions in their entirety." (Tr. 792).

3. The Court then charged as follows: "At the outset, I will say that before the defendant may be found guilty of a crime, the prosecution must prove, beyond a reasonable doubt, that under the statute described in these instructions, the defendant was forbidden to do the act charged in the indictment and that he intentionally committed the act.

"The statute upon which the indictment is founded, provides in part that it shall be unlawful for any licensed dealer to sell or deliver any firearm to any person who the licensee knows or has reasonable cause to believe, does not reside in the State in which the licensee's place of business is located." (Tr. 801).

4. The Court further charged as follows: "Now, in order to sustain the charges in each of the two counts of the indictment, the Government must establish each of the following essential elements, beyond a reasonable doubt, as to each count.

"First, the defendant Cleary is a federally licensed retail gun dealer. Secondly, that on or about May third, 1973, the defendant Cleary sold and delivered the firearms described to Richard C. Dotchin, that is the firearms described in Count I, as to Richard Dotchin, and the firearms described in Count II as to Paul B. Flynn."

"Thirdly, that the defendant Cleary knew or had reasonable cause to believe that Dotchin and Flynn did not reside in the State of Vermont and lastly, that the defendant, Cleary, acted knowingly and wilfully." (Tr. 802) (Underscoring supplied).

5. The Court further explained in its charge that all of the first three elements of the crime, as previously discussed, were matters in "dispute." The Court further stated that even though there was little dispute regarding the first element, namely, that Cleary was a licensed firearm dealer, the Court nonetheless properly instructed: "Nevertheless, because the Government has the burden of proving each and every element of the offense beyond a reasonable doubt, you must still find that this element has been satisfied." (Tr. 803).

Following all of the foregoing, the Court then instructed the jury with words which defendant now claims removed from the jury's consideration the factual issue of whether defendant Cleary had intended to make a bona fide sale of firearms to Harold Anderson, the Vermont resident, rather than an illegal sale to Agents Dotchin and Flynn.

It is submitted that the defendant's construction of this part of the charge is unwarranted when viewed in light of the charge which preceded it.

As noted in item 3, above, the Court first cautioned the jury that the prosecution was required to prove beyond a reasonable doubt under the applicable criminal statute that the defendant was forbidden to do the act charged in the indictment and that he intentionally committed the act. The Court then stated that under the applicable statute it was unlawful for a licensed dealer to sell or deliver firearms to persons whom he believed to be non-residents. The Court then stated that in order to sustain the charges on each count, the Government must establish, beyond a reasonable doubt, four elements of the crime, including the second element "that on or about May 3rd, 1973, the defendant sold and delivered the firearms ... to Richard Dotchin and Paul B. Flynn."

Accordingly, when the Court gave the questioned instruction, viz: "As to ... the second element, which is in dispute, I instruct you that you must find, beyond a reasonable doubt, that the defendant sold the firearm in question to the named persons ...", it is clear that the Court was relating this instruction back to its earlier instruction, viz:

"Now, in order to sustain the charges in each of the two counts of the indictment, the Government must establish each of the following essential elements, beyond a reasonable doubt, as to each count."

Thus, the disputed part of the charge is not a partially directed verdict on material facts, as contended by the defendant, but an admonition to the jury that the facts required to prove the second element, namely the sale and delivery of firearms to Agents Dotchin and Flynn, must be found from the evidence, beyond a reasonable doubt, in order to sustain the charges.

Further, if the Court had meant to take the issue of sale and delivery from the jury, there would have been no need to point out that the issue of sale and delivery was "in dispute." By way of example, when the Court dealt with the first element of the offense, (viz. that Cleary was a licensed firearms dealer), the Court pointed out: "As to the first element, there is little, if any dispute ... nevertheless, because the Government has the burden of proving each and every element of the offense beyond a reasonable doubt, you must still find that this element has been satisfied." (Tr. 803).

A fortiori, if the jury were instructed that it was necessary for them to find an undisputed element in order to sustain the charges, certainly the jury understood that the facts of a disputed element had to be found, and was not a matter which the Court had removed from the jury's consideration.

Accordingly, the disputed part of the charge should not be considered as a direction by the Court that the second element had been proven as a matter of law, but an admonition that the facts comprising element two must be found beyond a reasonable doubt in order to convict the defendant.

Secondly, no consideration should be given to defendant's claim regarding the portion of the charge relating to sale and delivery since defendant's counsel did not make a proper objection required under Rule 30 of the Federal Rules of Civil Procedure, which provides in part: "No party may assign as error any portion of the charge ... unless he objects thereto ... stating distinctly the matter to which he objects and the grounds of his objection."

It has been repeatedly held that Rule 30 requires that a defendant's objection to a charge must be sufficiently clear so that the trial judge can perceive the basis on which it is claimed the instruction is erroneous. United States v. Valdes, 417 F.2d 335, 338, 339 (2nd Cir. 1969).

In the present instance, defendant's objection to the entire charge was extremely general and brief, as follows:

> "The Defendant would object to your instructions about entrapment. The instructions on knowingly and wilfully and in your instructions on the second element of the crime or criminal act in that you indicated to the jury that "deciding" of law does not technically mean a sale was the question that they are deciding." (Tr. 811).

As defendant's brief points out, the objection regarding the second element is garbled to the point where it denotes little meaning. However, there are three words which stand out in the above underlined objection, viz., "technically," "mean." and "sale." These worda are found not in the paragraph of the charge objected to, but in a part of the charge two paragraphs removed from the objectionable part of the charge. In relation to each other, the two paragraphs appeared in the charge as follows:

"As to ... the second element, which is in dispute, I instruct you that you must find, beyond a reasonable doubt, that the defendant sold the firearm in question to the named persons and that he delivered the firearm to the persons so named.

"I further instruct you that in applying the words, "sell and deliver," you must use your own common sense and not apply any technical interpretation of those words to them. To "sell", of course, means to transfer to another for a price. Usually to be paid in money. And to "deliver" means to transfer possession voluntarily from one person to another.

"In the case of a sale from the buyer to the seller, the fact that a Vermont resident actually signed the firearms transaction records, does not necessarily mean the gun was technically sold to him. You must examine all of the circumstances surrounding the transaction, including who negotiated the purchase, provided the funds, and took possession and delivery and for whom the beneficial use of the weapon was intended, in order to determine to whom the sale was actually made. (Tr. 803, 804).

It seems clear that the objection made by defendant's counsel, even assuming that it satisfied the requirements of Rule 30 requiring distinct statements, did not relate to the first paragraph, above, but to the second and third paragraphs, above. In short, the objection was not to the removal of a factual issue from the jury's determination, but to the Court's definition of the word "sale."

Accordingly, both for the reason that the charge was correct when viewed as a whole and for the reason that no proper objection was made to the charge under Rule 30, the Court's charge on the questioned part of the "second element" should be upheld.

II. THE DEFENDANT WAS NOT ENTITLED TO A DIRECTED VERDICT OF ACQUITTAL ON THE ISSUE OF THE IDENTIFICATION OF THE DEFENDANT FOR THE REASONS THAT:

a. THE DEFENDANT WAS PROPERLY IDENTIFIED THROUGH COMPETENT CIRCUMSTANTIAL EVIDENCE.

b. THE DEFENDANT WAIVED ANY IDENTIFICATION ISSUE BY PROCEEDING WITH TESTIMONY IN HIS OWN BEHALF.

a. THE DEFENDANT WAS PROPERLY IDENTIFIED THROUGH COMPETENT CIRCUMSTANTIAL EVIDENCE.

The defendant contends that he was not identified during the Government's case as the person charged in the indictment, and he asks that judgment of acquittal be entered in his behalf.

As noted in the Statement of Facts, supra, defendant Cleary was identified in open court as a federally licensed firearms dealer (see copy of license, Gov't Ex. 3), and the owner and operator of the Powder Horn Gun Shop in Williston, Vermont. Agent Cuyler likewise identified defendant Cleary as the person who transacted the sale involving Titcum, Duvernoy and Hall, on March 23, 1973. Agent Cuyler further testified that

defendant Cleary, on March 23, 1973, filled out a Firearms Transaction Record (Form 4473) similar to Government's Exhibit 4.

In the subsequent sale of firearms to Agents Dotchin and Flynn on May 3, 1973, the evidence showed that Agents Dotchin, Flynn and Trooper Anderson again went to the Powder Horn Gun Shop in Williston, Vermont, and there purchased firearms from John P. Cleary who signed two 4473 forms as "John P. Cleary - Powder Horn Gun Shop - Owner." (See Government's Exhibit 2 and Government's Exhibit 3).

Certainly, this circumstantial evidence on identification, all of which occurred during the Government's case in chief, was enough to place the issue of identification before the jury. This Court has held that circumstantial evidence, including documentary evidence, is a proper form of proof on the issue of identity. United States v. Rosenberg, 195 F.2d 583, 597, 2nd Cir. (1952); United States v. Flores-Rodriguez, 237 F.2d 405, 408 (2nd Cir. 1956).

Accordingly, there was ample circumstantial evidence to take the issue of identification to the jury.

b. THE DEFENDANT WAIVED ANY IDENTIFICATION ISSUE BY PROCEEDING WITH TESTIMONY IN HIS OWN BEHALF.

While the Government produced only circumstantial evidence in its direct case connecting Cleary with the transactions with Dotchin and Flynn on March 3, 1973, it is clear from the record that defendant Cleary was later identified during the trial through his own personal admissions, while testifying in his own defense. However, since defendant's counsel had raised the issue of identity first during the testimony of his initial witness, by means of a motion for a directed verdict of acquittal, and prior to defendant's testimony, he urges this Court to reject a long line of decisions of many Courts of Appeal standing for the proposition that the defendant waives his Motion for Acquittal if he proceeds with his evidence, and any shortage of evidence is thereafter overcome, even if the evidence is later adduced in the defendant's case. See for example, United States v. Cashio, 420 F. 2d 1132, 1134, 5th Cir. (1969).

The position of the Second Circuit, on such motions for directed verdict of acquittal, is stated in United States v. Brown, 456 F.2d 293, (1972) as follows:

> "Upon such a denial (of a motion for a directed verdict of acquittal) a defendant 'must decide whether to stand on his motion or put on a defense, with the risk that in so doing he will bolster the Government's case enough for it to support a verdict of guilty' McGautha v. California, 402 U.S. 183, 215-216, 91 S.Ct. 1454, 1471, 28 L.Ed 2d 711 (1971)."

Accordingly, the law of this circuit, as set forth in the Brown case above, bars the defendant from renewing his Motion for a Directed Verdict of Acquittal on the grounds stated (lack of proof of identity), since any such defect was cured by evidence later adduced in the defendant's case.

CONCLUSION

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN ITS INSTRUCTIONS ON THE SECOND ELEMENT OF THE CFFENSE NOR IN ITS DENIAL OF DEFENDANT'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL BASED ON LACK OF PROOF OF IDENTIFICATION. THE JUDGMENT OF CONVICTION ON BOTH COUNTS SHOULD BE AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

JOHN P. CLEARY,
Defendant-Appellant

CERTIFICATE OF SERVICE

I do hereby certify that on the 23rd day of April, 1974, I made service of the BRIEF FOR THE PLAINTIFF-APPELLEE upon John P. Cleary, Defendant-Appellant, by mailing copies of same, postage prepaid, to Peter M. Cleveland, Esq., Box 123, Essex Junction, Vermont 05452, attorney of record for said Defendant-Appellant.

George W.F. Cook

GEORGE W.F. COOK
UNITED STATES ATTORNEY

Address:

P.O. Box 10
Rutland, Vermont 05701